

July 2015

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Recommended Citation

Partlett, David F. and Weaver, Russell L. (2006) "Introduction: Fourth Remedies Discussion Forum," *Akron Law Review*: Vol. 39 : Iss. 4 , Article 1.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol39/iss4/1>

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INTRODUCTION: FOURTH REMEDIES DISCUSSION FORUM

David F. Partlett and Russell L. Weaver***

The Fourth Remedies Discussion Forum was held at the University of Louisville on November 19, 2005.¹ As with prior fora, our goal was to bring together a small group of prominent remedies scholars to discuss matters of common interest. This year's forum focused on two topics: "tort reform" and "damages in news gathering cases."

Most forum articles examined the subject of tort reform, but they approached it from an array of perspectives. Three of the articles provide an overview on the subject. Professor Michael P. Allen's article, *A Survey and Some Commentary on Federal "Tort Reform,"* surveys the major types of tort reform that are "possible" on the federal level, and provides commentary on the various types. The next two articles suggest the desirability of a historical approach to tort reform. Professor Rachel M. Janutis's *The Struggle Over Tort Reform and the Overlooked Legacy of the Progressives* notes that tort reform has historically involved a debate between corporate, professional, and insurance interests, and she urged a focus on Progressive and Populist Era history as a way of "assessing constitutional provisions aimed at altering the balance of power among the legislature, the judiciary and the jury with respect to common law tort remedies." Professor Irma Russell's *The Logic of Legal Remedies and the Relative Weight of Norms: Assessing the Public Interest in the Tort Reform Debate* argues for a strong correlation of social norms to the tort reform debate. She argues that "[t]ort reform measures should preserve the traditional balance and fulfill the basic purposes of tort law that have long provided precedent and social ordering," and that consideration "of the historical uses of tort law and the normative baseline for comparing competing

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1. Organizers of the Remedies Discussion Forum wish to express their appreciation to LexisNexis, Washington & Lee University School of Law & the University of Louisville's Louis D. Brandeis for their financial support which made the forum possible.

interests is crucial in the tort reform debate.” These articles add nicely to torts scholarship that draws upon the historic and moral roots of tort liability.²

A couple of articles focus on the problem of statutory damage and appeal bond caps. Professor Doug Rendleman’s *Appeal Bond Caps: Tort Reform for a Punitive Damages Verdict During Post-Verdict Judicial Review* analyzes the history of appeal bond caps and proposed reforms that limit the amount of caps. Professor Colleen P. Murphy’s *Statutory Caps and Judicial Review of Damages* examines statutory caps on damages and judicial review of awards for excessiveness. She concludes that such caps “should not alter normal judicial review of jury awards,” that statutory caps should not be regarded as “benchmarks,” and that a court should not reduce an award to the cap if the award would still be excessive. The substantive rights of litigants are much influenced by these “caps,” and both papers uncover consequences heretofore not well understood.

A couple of articles question the efficacy and legitimacy of prior tort reforms, both legislative and judicial. Professor Tracy A. Thomas’s *Restriction of Tort Remedies and the Constraints of Due Process: The Right to an Adequate Remedy* focuses on the concern that “tort reform remedy restrictions work arbitrarily to restrict an individual’s right to a meaningful remedy that threatens to dilute common-law rights.” As a result, she argues that “the due process guarantees provide a restraint on the tort remedy stripping provisions that deny plaintiffs their fundamental right to a meaningful remedy.”³ Professor Caprice Roberts’ article, *Ratios, (Ir)rationality & Civil Rights Punitive Awards*, argues that the *State Farm Mutual Auto Insurance Co. v. Campbell*⁴ ratios applied in reviewing punitive damage awards are irrational as applied in civil rights cases because they extinguish access to meaningful punitive damages in those types of cases. The paper drives yet another stake in the heart of the ratio test first formulated by Justice O’Connor.⁵

The most sweeping suggestion for reform comes from Professor Elaine Shoben’s *Let the Damages Fit the Wrong: An Immodest Proposal for Reforming Personal Injury Damages*. Professor Shoben questions

2. John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (arguing that the common law grounds a due process right of redress).

3. *Id.*

4. 538 U.S. 408 (2003).

5. See David Partlett, *The Republican Model and Punitive Damages*, 41 SAN DIEGO L. REV. 1409 (2004) (also criticizing the ratio test).

the fundamental premise of compensatory damages (the “goal of making victims whole”) and suggests a fundamental reformulation of tort law to focus on the “wrong.” She advocates that damages be calculated based on three factors: “the degree of the wrongfulness of the tort, the severity of the harm, and the extent to which the risky conduct was directed at the plaintiff.” She argues that her approach would “provide a framework for assessing damages that would be more consistent across cases and more predictable.”

The last article in this section, Professor Michael Kelly’s *What Makes the Collateral Source Rule Different?*, analyzes Paul H. Rubin and Joanna M. Sheperd’s working paper on a “correlation between tort reforms and the rate of fatal accidents in the states which adopted these tort reforms.”⁶ He suggests that the paper’s conclusions challenge “conventional wisdom” and then analyzes the conclusions as applied to the collateral source rule. He raises methodological issues and questions whether the general data on damage caps can be generalized to the collateral source rule.

The final two articles deal with issues relating to defamation and privacy. In our article, *Remedies, Neutral Rules and Free Speech*, we argue that the United States Supreme Court’s landmark decision in *New York Times Co. v. Sullivan*⁷ produced robust speech, shed the shackles of defamation law, and embraced earlier decisions limiting press licensing provisions and prohibiting prior restraints. However, as it became difficult for defamation plaintiffs to recover large damage judgments, litigants have shifted their focus to non-defamation theories and to a focus on the methods by which information is generated. The article analyzes the efficacy of those alternate theories as an effective measure of recovery and the impact of liability on free speech. Last, but not least, Professor John McCamus’s *Celebrity Newsgathering and Privacy: The Transformation of Breach of Confidence in English Law* analyzes the tort of invasion of privacy and, in particular, the branch involving breach of confidence. Breach of confidence has been broadened to protect privacy interests, in the absence of a privacy tort. In respect of genetic information, one of us has argued that a breach of confidence action has distinct advantages over privacy theories.⁸ The comparative development of privacy law in the courts of our common law cousins

6. Paul H. Rubin & Joanna M. Sheperd, *Tort Reform and Accidental Deaths*, EMORY LAW SCHOOL LAW & ECONOMICS WORKING GROUP, Paper No. 05-17 (2006).

7. 376 U.S. 254 (1964).

8. David Partlett, *Misuse of Genetic Information: The Common Law and Professionals’ Liability*, 42 WASHBURN L. J. 489 (2003).

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bears close observation. Professor McCamus's article will spur that examination.